IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1891

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Pursuant to Rule 42(3) of the Supreme Court Rules, the National Associaiton of Stevedores respectfully moves

for leave to file the attached brief as *Amicus Curiae* in support of the petitioner. Counsel for the petitioners have consented to the filing of this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STEVEDORES

The National Association of Stevedores (NAS) is a nonprofit corporation incorporated on January 30, 1975 pursuant to the District of Columbia Non-profit Corporation Act, 29 D.C. Code 1001 *et seq.*, for the purpose of promoting, furthering and supporting the stevedoring and marine terminal industry in the United States, its territories and possessions. It is the corporate successor to the unincorporated association of the same name organized in the District of Columbia in 1933. It has been given tax exemption rulings by both the Government of the District of Columbia and the Internal Revenue Service. Sec. 1005(b) of Title 29 of the District of Columbia Code specifically provides that a non-profit corporation shall have the power to sue and be sued, complain and defend, in its corporate name.

The present membership of the NAS comprises 68 private marine terminal and stevedore employers doing business in ports on the nation's four seacoasts and the states of Hawaii, Alaska and the Commonwealth of Puerto Rico. Based upon U.S. government manhour statistics it is conservatively estimated that NAS member companies are responsible for over 75 percent of the industry's total manhours in all U.S. ports.

The member companies of the NAS employ the majority of U.S. longshore and privately employed marine terminal labor entitled to compensation pursuant to the Longshoremen's and Harbor Workers' Compensation Act, (the "LHWCA"), 33 USC § 901 *et seq.* The NAS members companies are directly responsible for workers' compensation payments under both federal and state law

either as self-insureds or through insurance carriers licensed by the U.S. Department of Labor or state insurance commissions.

Thus, the interest of the NAS and its member companies in the outcome of any litigation concerning the scope of benefits and jurisdiction of the federal LHWCA is second to none, except the injured worker.

LHWCA insurance costs, be it premiums paid to licensed carriers, or benefits paid directly to employees, are the second largest cost of a private marine terminal operator or stevedore company, exceeded only by direct payroll expenses. Any decision by this or any other Court or administrative body as to which employee is entitled to federal LHWCA benefits and the amount of such benefits, has a direct and substantial economic impact upon each and every member of the NAS. For these reasons, the NAS has been authorized and directed by its member companies to appear on their behalf in all appropriate Courts until such matters are finally resolved. Pursuant to that mandate the NAS has participated as a party before the Benefits Review Board, U.S. Department of Labor and before the Fourth Circuit Court of Appeals. In addition, the NAS appeared as *amicus curiae* before the Second and Fifth Circuit Court of Appeals and in this Court in *Northeast Marine Terminal Corp.* v. *Caputo et al.*, 432 U.S. 249 (1977), *Edmonds* v. *Compagnie Generale Teansatlantic*, 443 U.S. 256 (1978), and *P. C. Pfeiffer Co., Inc.* v. *Ford*, 444 US 69 (1979).

Amicus Curiae has examined the language and legislative history of the LHWCA and its 1972 amendments primarily in light of their impact upon stevedore employers who must pay compensation thereunder to injured longshoremen. *Amicus curiae* does not believe that the parties have considered the issue before this Court in precisely the same manner.

Amicus curiae therefore requests that this Court grant it leave to file the attached brief.

Respectfully submitted,

THOMAS D. WILCOX
THOMAS D. WILCOX, P.C.
1899 L St., N.W.
Washington, D.C. 20036
(202) 296-3005
Attorney for
National Association of Stevedores
Amicus Curiae

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THE STATUTE INVOLVED

This case involves the proper construction of sections 2(13) and 9(e) of the Longshoreman's and Harbor Workers' Compensation Act, 33 USC §§ 902(13) and 909(e), which provide as follows:

> SEC. 2. (13) "Wages" means the money rate at which the service rendered is recompensed

under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

SEC. 9. (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 906(b) of this title but the total weekly benefits shall not exceed the average weekly wages of the deceased.

THE QUESTION PRESENTED

The question presented to this Court, simply stated, is whether employer contributions made to union pension and/or welfare funds pursuant to collective bargaining agreements are "wages" within the meaning of section 2(13).

ARGUMENT

A. The Decision Below Is Clearly Wrong

For the reason so cogently stated by petitioners, the National Association of Stevedores believes that the decision of the United States Court of Appeals for the District of Columbia in *Hilyer* v. *Morrison-Knudsen et al* dated Dec. 1, 1980, (Nos. 80-1388, 80-1440, and 80-1504) from which certiorari is sought is plainly wrong and interjects into the statutory scheme enacted by Congress in 1928, and not changed since then, items which the Congress never intended to be included in the term "wages". Had Congress intended to include fringe benefit payments made pursuant to collective bargaining agreements in the computation of "wages" or "average weekly wage", Congress would have done so. It did not do so in 1928, and it did not do so in 1972 when it

made massive changes to the Longshoremen's and Harbor Workers' Compensation Act by enacting Public Law 92-576, 86 Stat. 1251 *et seq.*

The court below has in effect made legislative amendments to the Act which the Congress has not, and never intended, and for that reason the petition for writ of certiorari should be granted and the decision of the Court below reversed.

B. The Devastating Impact of the Decision Below

As petitioners state on page 6 of the Petition for Writ of Certiorari this case does appear at first blush to be an ordinary and narrow one of statutory construction. However, it is not. Petitioners' fears that unless the decision is promptly reversed it will have extraordinary and far-reaching consequences have been realized. Although the decision below was seemingly restricted to a single claim under the District of Columbia Workmen's Compensation Act, 36 D.C. Code § 501 *et seq.*, it now reaches all claims under the Longshoremen's and Harbor Workers' Compensation Act, as the District of Columbia Act is only an extension of the former. Thus, shortly after the decision of the Court below, member companies of the National Association of Stevedores were presented with claims under the Longshoremen's and Harbor Workers' Compensation Act which sought for the first time since 1928 the inclusion of the *Hilyer* fringe benefits in the calculation of average weekly wage.

Attempts by employers to confine the *Hilyer* decision to the District of Columbia were short lived. On April 28, 1982, the Benefits Review Board, which pursuant to sec. 21 of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC § 921, hears all appeals on claims made under that Act, reversed its long standing position because of the decision below, and for the first time held that fringe benefits were "wages", *Lloyd E. Minick* v. *Levin Mitals Corp.*, BRB No. 80-835. The

Hilyer plague has now spread nationwide and must be considered in each of the more than 200,000 Longshore Act claims filed annually.

The financial impact on employers is devastating and almost beyond comprehension. A recent survey conducted by the National Association of Stevedores indicates that for the industry it represents fringe benefits under the several applicable collective bargaining agreements vary from *40 to 70 percent of direct hourly wages.* In one range of ports, the hourly fringe *benefits* (the plural is emphasized) are $4.95 on an average straight time's hourly wage of $12.40, or 40%. In addition, the decision below does not specify which employer contributions are to be included. Is it all? Is it only some, and if so, which ones? Not all collective bargaining agreements are the same. Another unresolved problem is the taxability of fringe benefits if they are to be included as "wages". Must employers now withhold and report the fringe benefit payments to the Internal Revenue Service?

Finally, the decision below raises the question of what is the "national average weekly wage" to be calculated annually by the Secretary of Labor pursuant to sec. 10(f) of the Act, 33 USC § 910(f) and sec. 6(b)(3), 33 USC § 906(b)(3)? Since the maximum benefits payable under the Act are 200 percent of the national average weekly wage it must be assumed that if *Hilyer* remains the law the Secretary of Labor must increase his computation of the national average weekly wages by about 30 percent, which, by operation of sec. 6 increases the maximum benefit level by 60 percent.[1] No industry, and no single employer, can survive such a massive increase in workers' compensation costs, even if one assumes the Secretary of Labor is able to place a dollar value on the fringe benefits of every collective bargaining agreement in the United States.

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[1] The present maximum benefit level under the Act is $497.24 per week.

CONCLUSION

For the reasons stated the National Association of Stevedores urges this Court to promptly grant the Petition for Writ of Certiorari and reverse the decision of the Court below.

Respectfully submitted,

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Washington, D.C. 20036
(202) 296-3005
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